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9 STARR INDEMNITY & LIABILITY  
COMPANY

10  
11 **UNITED STATES DISTRICT COURT**  
12 **DISTRICT OF NEVADA**  
13

14 STARR INDEMNITY & LIABILITY  
COMPANY,

15 Plaintiff,

16 vs.

17 LIMMIE YOUNG, III, an Individual;  
STACEY ACKERMANN, an Individual;  
18 AUDRA L. DUVALL, an Individual;  
MICHAEL JOHN DUVALL, an Individual;  
19 APOSSEADESSE III, LLC dba MASSAGE  
ENVY SPA, a Nevada Corporation,

20 Defendants.  
21  
22  
23  
24  
25

CASE NO.: 2:14-CV-00239-MMD-NJK

**STARR INDEMNITY & LIABILITY  
COMPANY'S MOTION FOR SUMMARY  
JUDGMENT**

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**STARR INDEMNITY & LIABILITY COMPANY'S MOTION FOR SUMMARY JUDGMENT**

COMES NOW Plaintiff, STARR INDEMNITY & LIABILITY COMPANY ("Starr"), by and through its attorneys, the law firm of Murchison & Cumming, LLP, and hereby files its Motion for Summary Judgment.

This motion is based on the Memorandum of Points and Authorities, all of the pleadings and papers on file herein, and such argument as the Court may allow at the hearing of Plaintiff's Motion.

DATED: May 1, 2014

**MURCHISON & CUMMING, LLP**

By /s/ Dustun H. Holmes  
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**MEMORANDUM OF POINTS AND AUTHORITIES****I.****INTRODUCTION**

This declaratory relief action brought by Starr seeks a declaration by the Court that upon the policy of insurance issued by Starr, there exists no duty to defend or indemnify its insured Limmie Young, III in two underlying lawsuits pending in the Eighth Judicial District Court of Nevada. Starr undertook Young's defense in the two underlying actions discussed more below, subject to a reservation of rights, including the right to file this action seeking a declaration of the Court that no coverage exists for the claims asserted against Young under the terms and provisions of the Starr policy.

Defendants Stacey Ackermann, Audra Duvall, John Duvall, and Aposseadesse III, LLC are not parties to the insurance contract and are not a Starr insured. However, these Defendants were specifically named in this declaratory relief action as to the extent they are necessary parties to determine insurance coverage for the claim. Based upon the allegations contained within the underlying complaints, both Stacey Ackermann and Audra Duvall allege that Young inappropriately touched and sexually assaulted them while undergoing a massage at Aposseadesse III, LLC dba Massage Envy, where Young was employed at the time.

Regardless of the truth or falsity of the allegations raised against Young, when the allegations of the underlying complaints are compared to the language of the Starr policy, it is beyond a doubt that there is no coverage under the Starr policy. Therefore, declaratory relief is available as set forth below.

**II.****STATEMENT OF FACTS****A. The Starr Policy.**

At the time of the incidents described below, there was a participant General Liability Policy numbered P3GL-100000-03, underwritten by Starr Indemnity & Liability Company and

1 issued to Sports and Recreation Providers Association Purchasing Group which contains a  
 2 Certificate of Insurance reflecting that Limmie Young, III (Young) as an insured ("Starr Policy").<sup>1</sup>  
 3 The Starr policy had an applicable policy period from June 16, 2010 to June 16, 2011. The Starr  
 4 policy only provides coverage as follows in the insuring agreement:

5 **SECTION I COVERAGES**

6 **COVERAGE A BODILY INJURY AND PROPERTY DAMAGE LIABILITY**

7 **1. Insuring Agreement**

- 8 a. We will pay those sums that the insured becomes legally  
 9 obligated to pay as damages because of "bodily injury" or  
 10 "property damage" to which this insurance applies. We will have  
 11 the right and duty to defend the insured against any "suit"  
 12 seeking those damages. However, we will have no duty to  
 13 defend the insured against any "suit" seeking damages for  
 14 "bodily injury" or "property damage" to which this insurance does  
 15 not apply. We may, at our discretion, investigate any  
 16 "occurrence" and settle any claim or "suit" that may result. But:...
- 13 b. This insurance applies to "bodily injury" and "property  
 14 damage" only if:
- 15 (1) The "bodily injury" or "property damage" is caused by an  
 16 "occurrence" that takes place in the "coverage territory";
- 17 (2) The "bodily injury" or "property damage" occurs during the  
 18 policy period; ...

18 The Starr policy contained an "expected or intended injury" exclusion that provides the  
 19 following:

20 **2. Exclusions**

21 This insurance does not apply to:...

22 **a. Expected Or Intended Injury**

23 "Bodily injury" or "property damage" expected or intended from the  
 24 standpoint of the insured. This exclusion does not apply to "bodily  
 25 injury" resulting from the use of reasonable force to protect persons  
 26 or property.

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27 <sup>1</sup> Starr Policy, attached as Exhibit A, Bates No. STARR000001-46.

The Starr policy provides the following definition of "bodily injury" and "occurrence."

**SECTION V – DEFINITIONS**

3. "Bodily injury" means bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time.

13. "Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.

In addition to the standard policy form, the Starr policy contained the following abuse and molestation exclusion and assault and battery exclusion

**ABUSE OR MOLESTATION EXCLUSION**, which provides, in pertinent part:

This insurance does not apply to "bodily injury", "property damage" or "personal and advertising injury" arising out of:

- 1 The actual or threatened abuse or molestation by anyone of any person while in the care, custody or control of any insured, or
2. The negligent:
  - a. Employment;
  - b. Investigation;
  - c. Supervision;
  - d. Reporting to the proper authorities, or failure to so report; or
  - e. Retention;of a person for whom any insured is or ever was legally responsible and whose conduct would be excluded by Paragraph 1. above.

...

**EXCLUSION – ASSAULT AND BATTERY**, which provides, in pertinent part:

**2. Exclusions**

This insurance does not apply to:

**Assault and Battery**

"Bodily injury", "property damage" or "personal and advertising injury" arising from the following:

- (1) assault and battery or any act or omission in connection with the prevention or suppression of such acts; or
- (2) harmful or offensive contact between or among two or more persons; or
- (3) apprehension of harmful or offensive contact between or among two or more persons; or
- (4) threats by words or deeds.

This exclusion applies regardless of the degree of culpability or intent and without regard to:

- (1) whether the acts are alleged to be by or at the instruction or at the direction of the insured, his officers, employees, agents or servants; or

- 1 by any other person lawfully or otherwise on, at or near the premises  
 2 owned or occupied by the insured; or by any other person;  
 3 (2) the alleged failure of the insured or his officers, employees, agents or  
 4 servants in the hiring, supervision, retention or control of any person,  
 5 whether or not an officer, employee, agent or servant of the insured;  
 6 (3) the alleged failure of the insured or his officers, employees, agents or  
 7 servants to attempt to prevent, bar or halt any such conduct.

8 This exclusion also applies to any claims by any other person, firm or  
 9 organization, asserting rights derived from or contingent upon any person  
 10 asserting a claim excluded under subparagraphs 1, 2 or 3 (above); specifically  
 11 excluding from coverage claims for:

- 12 (1) emotional distress or for loss of society, services, consortium and/or  
 13 income; or  
 14 (2) reimbursement for expenses (including but not limited to medical  
 15 expenses, hospital expenses and wages) paid or incurred by such other  
 16 person, firm or organization; or  
 17 (3) any obligation to share damages with or repay someone who must pay  
 18 damages because of the injury.

19 **B. The Underlying Actions.**

20 Young tendered his respective defenses and requested indemnity as it relates to the  
 21 following underlying lawsuits against him: *Audra L Duvall, et al., v. Aposseadessee III, LLC,*  
 22 *Limmie Young, III, et al.,* Clark County District Court Case number A-13-681072-C<sup>2</sup> ("The  
 23 Duvall Underlying Action") and *Stacy Ackermann., v. Aposseadessee III, LLC, Limmie Young,*  
 24 *III, et al.,* Clark County District Court Case number A-13-678512-C<sup>3</sup> ("The Ackerman  
 25 Underlying Action"). Starr undertook Young's defense in The Duvall Underlying Action and The  
 26 Ackerman Underlying Action under a reservation of rights, including the right to file this action  
 27 seeking a declaration of the Court that no coverage exists for the claims asserted against  
 28 Young under the terms and provisions of the Starr policy.

The Duvall Underlying Action and The Ackermann Underlying Action allege the following  
 critical facts. According to the Complaint filed by Audra L. Duvall and Michael John Duvall  
 (collectively "The Duvalls"), on or about May 8, 2011, while undergoing a massage, Young

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<sup>2</sup> *Audra L Duvall, et al., v. Aposseadessee III, LLC, Limmie Young, III, et al.,* Complaint, attached as  
 Exhibit B, Bates No. STARR000060-85.

<sup>3</sup> *Stacy Ackermann., v. Aposseadessee III, LLC, Limmie Young, III, et al.,* Complaint, attached as Exhibit  
 C, Bates No. STARR000047-59.

1 inappropriately touched and sexually assaulted Audra Duvall. The Duvall Underlying Action  
2 alleges that pertinent allegations regarding the sexual assault:

3 ¶ 10. "At all times mentioned herein, and particularly on or about May 8, 2011, Plaintiff  
4 was a guest, client, and invitee of MASSAGE ENVY at its Centennial Gateway location, located  
5 at 5643 Centennial Center Blvd., Ste. 135, Las Vegas, Nevada 89149."

6 ¶ 13. "MASSAGE ENVY selected YOUNG to perform Plaintiff's massage."

7 ¶ 23. The modesty blanket had become dislodged with the stretching exercises,  
8 exposing her genitalia and buttocks.

9 ¶ 23. When Young performed the stretching exercises, Plaintiff felt YOUNG lean into  
10 said stretches with his pelvis which caused YOUNG's genitalia and pelvis to repeatedly make  
11 contact with Plaintiff's genitalia.

12 ¶ 24. YOUNG placed his erect penis on Plaintiff's hand. YOUNG was sexually aroused.

13 ¶ 30. Young sexually assaulted Audra Duvall by "exposing Plaintiff's private areas,  
14 including her breasts, vagina, and buttocks multiple times, by touching Plaintiff's breasts without  
15 authorization or consent, by YOUNG placing his pubic area and pushing into the same multiple  
16 times all the while making comments with sexual undertones in an attempt to sexually arouse  
17 the Plaintiff and/or for sexual gratification of YOUNG, making advances which were sexual in  
18 nature, and by YOUNG placing his erect penis onto Plaintiff's hand; all which was done for  
19 sexual gratification of YOUNG...and all of which was done without prior notice, prior consent,  
20 and/or the prior approval and/or agreement of Plaintiff."

21 ¶ 82. "YOUNG impermissibly engaged in lewd and lascivious acts with Plaintiff, without  
22 Plaintiff's consent or permission. YOUNG also directly and/or indirectly caused Plaintiff's  
23 genitalia, buttocks, and breasts to become exposed numerous times and/or failed to take steps  
24 to avoid the unnecessary exposure of Plaintiff's genitalia, buttocks, and breasts. Finally,  
25 YOUNG made unwanted and impermissible physical contact with the Plaintiff; including, contact  
26 with Plaintiff's genitalia and breasts and by placing his penis in Plaintiff's hand."

27 ¶ 93. "That the Defendants negligently and/or intentionally caused the Plaintiff to feel  
28 apprehension of harmful or offensive contact when Defendants unlawfully engaged in lewd or

1 lascivious acts sexual in nature, touched Plaintiff breasts and genitalia without permission or  
 2 consent, exposing Plaintiff's breasts and genitalia without permission or consent, and placing  
 3 YOUNG's penis on Plaintiff's hand without permission."

4 ¶ 100. "That the Defendants negligently and/or intentionally made physical contact with  
 5 the Plaintiff when Defendants unlawfully engaged in lewd or lascivious acts sexual in nature,  
 6 touched Plaintiff breasts and genitalia without permission or consent, exposing Plaintiff's  
 7 breasts and genitalia without permission or consent, and placing YOUNG's penis on Plaintiff's  
 8 hand without permission."

9 Based upon the foregoing factual counts, the Duvalls' allege the following causes of  
 10 action against Young:

- 11 1. Negligence
- 12 2. Gross Negligence
- 13 3. Negligence Per Se
- 14 4. Negligent Infliction of Emotional Distress
- 15 5. Intentional Infliction of Emotional Distress
- 16 6. Civil Assault
- 17 7. Civil Battery
- 18 8. Loss of Consortium

19 The remaining causes of action are directed to Aposseadess III, LLC dba Massage Envy  
 20 Spa for breach of contract, tortious & contractual breach of the implied covenant of good faith &  
 21 fair dealing, negligent hiring/training/supervision/retention, respondeat superior/vicarious  
 22 liability, and declaratory relief.

23 Similarly, according to the Complaint filed by Stacey Ackermann, on or about May 21,  
 24 2011, while undergoing a massage, Young inappropriately touched and sexually assaulted her.  
 25 The Ackermann Underlying Action alleges that pertinent allegations regarding the sexual  
 26 assault:

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28 ///



1 ¶ 10. "On or about May 21, 2011, Plaintiff STACEY ACKERMANN (hereinafter  
2 "STACEY") was a business invitee at the Defendant APOSSEADESSE III, LLC's establishment  
3 located at 5643 Centennial Center Blvd., Ste. 135, in Las Vegas, Nevada."

4 ¶ 11. "On that date, while undergoing a massage, Defendant LIMMIE YOUNG III,  
5 proceeded to initiate unwanted, harmful and offensive sexual contact against Plaintiff."

6 ¶ 24. "Defendant LIMMIE YOUNG III by unlawfully initiating unwanted, harmful and  
7 offensive sexual contact against Plaintiff, intentionally subjected Plaintiff to severe emotional  
8 distress."

9 ¶ 30. Defendant LIMMIE YOUNG III was acting within the course and scope of his  
10 employment, service, or agency with Defendant APOSSEADESSE III, LLC, dba MASSAGE  
11 ENVY SPA

12 ¶ 41. The acts and gross conduct of Defendant LIMMIE YOUNG, III and Defendant ,  
13 APOSSEADESSE III, LLC, d/b/a MASSAGE ENVY SPA, as herein alleged, were intended to  
14 cause harm and injury to Plaintiff, as Defendant engaged in despicable and egregious conduct  
15 with a willful and conscious disregard of the rights of Plaintiff.

16 ¶ 42. As a direct and proximate causes of the gross negligence and conduct of  
17 Defendant's unwanted, harmful and offensive sexual contact upon her person, Plaintiff was  
18 seriously injured and caused to suffer intense physical and mental pain, shock and agony,  
19 some of which may be permanent and disabling in nature, aggravating to her general and  
20 compensatory damages.

21 Based upon the foregoing factual counts, Stacey Ackermann alleges the following  
22 causes of action against Young:

- 23 1. Negligence
- 24 2. Negligence Per Se
- 25 3. Intentional Infliction of Emotional Distress
- 26 4. Punitive Damages
- 27 5. Res Ipsa Loquitor

The remaining causes of action are directed to Aposseadess III, LLC dba Massage Envy Spa for respondeat superior, and negligent hiring, training and supervision.

### III.

#### LEGAL STANDARDS

##### A. Motion for Summary Judgment Standard.

Federal Rule of Civil Procedure 56 provides that summary judgment shall be rendered forthwith if depositions, documents, affidavits, admissions, interrogatory answers, or other materials show that "there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law." See Fed.R.Civ.P. 56(a); see also Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). Any dispute regarding a material issue of fact must be genuine – meaning that the evidence must be such that "a reasonable jury could return a verdict for the nonmoving party." Freecycle Sunnyvale v. Freecycle Network, 626 F.3d 509, 513 (9<sup>th</sup> Cir. 2010). "Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial" and summary judgment is proper. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587; 106 S.Ct. 1348; 89 L.Ed.2d 538 (1986).

The moving party bears the initial burden of showing the absence of a genuine issue of material fact. See Celotex, 477 U.S. at 323. The burden then shifts to the nonmoving party to set forth specific facts demonstrating a genuine factual issue for trial. See Matsushita, 475 U.S. at 587.

All justifiable inferences must be viewed in the light most favorable to the nonmoving party. Id. However, the nonmoving party may not rest upon the mere allegations or denials of his or her pleadings, but he or she must produce specific facts, by affidavit or other evidentiary materials as provided by Rule 56(e), showing there is a genuine issue for trial. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986). The court need only resolve factual issues of controversy in favor of the non-moving party where the facts specifically averred by that party contradict facts specifically averred by the movant. See Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 888 (1990); see also Anheuser-Busch, Inc. v. Natural Beverage Distribs., 69 F.3d 337,

345 (9th Cir.1995) (stating that conclusory or speculative testimony is insufficient to raise a genuine issue of fact to defeat summary judgment). Evidence must be concrete and cannot rely on “mere speculation, conjecture, or fantasy. O.S.C. Corp. v. Apple Computer, Inc., 792 F.2d 1464, 1467 (9th Cir.1986). “[U]ncorroborated and self-serving testimony,” without more, will not create a “genuine issue” of material fact precluding summary judgment. Villiarimo v. Aloha Island Air Inc., 281 F.3d 1054, 1061 (9th Cir.2002).

Summary judgment shall be entered “against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.” Celotex, 477 U.S. at 322. Summary judgment shall not be granted if a reasonable jury could return a verdict for the nonmoving party. See Anderson, 477 U.S. at 248.

**B. Rules of Insurance Policy Interpretation.**

The question of the interpretation of a contract when facts are not disputed is a question of law.” Grand Hotel Gift Shop v. Granite State Ins. Co., 108 Nev. 811, 839 P.2d 599, 602 (1992). An insurance policy is a contract, “construed as written absent any ambiguity.” Siggelkow v. Phoenix Ins. Co., 109 Nev. 42 (1993). “A[n] [insurance] policy is also judged as a whole: a court must look ‘to the entire contract ... for a true understanding of what risks are assumed by the insurer and what risks are excluded.’ ” Montana Ref. Co. v. Nat'l Union Fire Ins. Co., 918 F.Supp. 1395, 1397 (D. Nev. 1996) (quoting Nat'l Union Fire Ins. Co. v. Reno's Executive Air, 100 Nev. 360, 682 P.2d 1380, 1383 (1984)). “[T]he court will not ‘rewrite’ the terms of the contract.” Montana Ref. Co., 918 F.Supp. at 1398 (quoting State Farm Mut. Auto. Ins. Co. v. Cramer, 109 Nev. 704, 857 P.2d 751, 755 (1993)).

Under Nevada law, an insurer has a duty to defend its insured whenever there is potential for coverage. Bidart v. Am. Title, 734 P.2d 732, 734 (Nev. 1987). In other words, “[a]n insurer ... bears a duty to defend its insured whenever it ascertains facts which give rise to a potential for coverage under the policy.” United Nat'l Ins. Co. v. Frontier Ins. Co., 120 Nev. 678, 99 P.3d 1153, 1158 (2004). However, “the duty to defend is not absolute. A potential for coverage only exists when there is arguable or possible coverage. Determining whether an

insurer owes a duty to defend is achieved by comparing the allegations of the complaint with the terms of the policy.” Id. Further, because the duty to defend is broader than an insurer's duty to indemnify, if a court determines that there is no duty to defend, the insurer will not have a duty to indemnify. Id. at 684.

In examining the complaint, the focus is not on “the technical legal cause of action” but rather on the potential for liability as revealed by the facts alleged. CNA Cas. of California v. Seaboard Sur. Co., 176 Cal.App.3d 598, 606–07, 222 Cal.Rptr. 276 (1986).<sup>4</sup>

#### IV.

#### ARGUMENT

##### A. Defendants Stacey Ackermann, Audra Duvall, John Duvall, and Aposseadesse III, LLC are only named in this action because they are considered necessary parties.

Starr has brought this declaratory relief action seeking a judicial determination regarding the rights and responsibilities under an insurance contract between Starr and Defendant Young. Defendants Stacey Ackermann, Audra Duvall, John Duvall, and Aposseadesse III, LLC are not parties to the insurance contract and are not a Starr insured. See Lumbermen's Underwriting Alliance v. RCR Plumbing, Inc., 114 Nev. 1231, 1235 (1998)(It is well established law that an insurance policy is a contract between the insurer and its insured.); Richard A. Lord, Williston on Contracts vol. 16, § 49.1, Contractual Nature of Insurance Contracts (Eagan, MN, 4th ed., Thomson West 2000)(cases holding the same). Nonetheless, these Defendants were specifically named in this declaratory relief action as it is well-settled that individuals in the position of these Defendants are generally considered necessary parties in a declaratory action brought to determine insurance coverage for the claim. See, e.g., Greenberg v. Fireman's Fund Ins. Co., No. CV-07-1554-PHX-DGC, 2007 WL 4105990, (D.Ariz. Nov. 16, 2007) (citing U.S. Fire Ins. Co. v. Milton Co., 938 F.Supp. 56, 57 (D.D.C.1996); Fed. Kemper Ins. Co. v. Rauscher, 807 F.2d 345, 354 n. 5 (3rd Cir.1986) (“[I]n a declaratory judgment proceeding

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<sup>4</sup> “In the context of interpreting insurance policy terms, the Nevada Supreme Court has often looked to persuasive precedent from other jurisdictions, especially California.” Zurich Am. Ins. Co. v. Coeur Rochester, Inc., 720 F.Supp.2d 1223, 1235 (D.Nev.2010).

1 involving an [insurance] policy, an injured person is a ‘necessary and proper’ party.”) (citation  
 2 omitted); U.S. Fid. and Guar. Co. v. Ditoro, 206 F.Supp. 528, 532-33 (M.D.Pa.1962) (the injured  
 3 party is “a necessary and proper party because the injured party has a material interest in the  
 4 outcome of the suit”); Georgia-Pacific Corp. v. Sentry Select Ins. Co., No. 05-CV-826-DRH,  
 5 2006 U.S. Dist. LEXIS 33975, at \*26, 2006 WL 1525678, at \*8 (S.D.Ill. May 26, 2006) (“[W]hen  
 6 dealing with an issue of insurance coverage, the underlying claimants are necessary parties,  
 7 whether the declaratory judgment action is filed by the insured or the insurer.”)).

8 **B. Coverage is excluded under the Abuse and Molestation Exclusion.**

9 The Starr Policy excludes coverage for "bodily injury" "arising out of [t]he actual or  
 10 threatened abuse or molestation by anyone of any person while in the care custody or control of  
 11 any insured." The terms “abuse” and “molestation” are undefined in the policies and thus take  
 12 “their plain, ordinary and popular connotations.” See American Express Ins. Co. v. MGM Grand  
 13 Hotels, Inc., 102 Nev. 601, 604 (1986). “Abuse” is defined to “use or treat in such a way as to  
 14 cause damage or harm” or to “treat with cruelty or violence, especially regularly or repeatedly.”  
 15 Oxford Dictionaries (2013). “Molestation” is defined as “assault or abuse (a person, especially  
 16 a woman or child) sexually.” Id. The words “abuse” and “molest” are commonly used to  
 17 describe unwanted sexual contact. Community Action for Greater Middlesex County, Inc. v.  
 18 American Alliance Ins. Co., 254 Conn. 387, 401 fn. 15 (Conn. 2000)

19 “Arising out of” are “words of much broader significance” than “caused by.” Davis v.  
 20 Farmers Ins. Group, 134 Cal.App.4th 100, 107 (2006). “They mean ‘originating from,’ ‘having its  
 21 origin in,’ ‘growing out of or ‘flowing from’ or in short, ‘incident to, or having connection with.’ ”  
 22 Id. The exclusion “precludes coverage of any claim” based on or relating to abuse or sexual  
 23 molestation. See Century Transit Systems, Inc. v. American Empire Surplus Lines Ins. Co., 42  
 24 Cal.App.4th 121, 127 (1996). Thus, exclusions like this one apply “irrespective of the legal  
 25 theory asserted against the insured.” Id. In particular, an insured “cannot rely upon the  
 26 allegations of negligence to create a potential for coverage.” Id. at 128.

27 Here, the Abuse or Molestation Exclusion contained in the Starr Policy clearly acts to  
 28 exclude coverage for the underlying actions because the plaintiffs in the underlying actions

1 allege their bodily injuries arise out of abuse or molestation by Young while they where in his  
2 care custody or control. See 12th Street Gym, Inc. v. Philadelphia Indem. Ins. Co., 2006 WL  
3 1652690 at \*2 (Pa.Com.Pl. 2006) (Abuse or Molestation Exclusion bars coverage where adult  
4 woman was assaulted by a massage therapist while in insured's massage room and thus, in its  
5 care, custody and control). When the allegations of the underlying complaints are compared to  
6 the language of the exclusion, it is beyond a doubt that the exclusion applies.

7 In The Duvall Underlying Action, the Duvalls allege that Young sexually assaulted Audra  
8 Duvall by "exposing Plaintiff's private areas, including her breasts, vagina, and buttocks multiple  
9 times, by touching Plaintiff's breasts without authorization or consent, by YOUNG placing his  
10 pubic area and pushing into the same multiple times all the while making comments with sexual  
11 undertones in an attempt to sexually arouse the Plaintiff and/or for sexual gratification of  
12 YOUNG, making advances which were sexual in nature, and by YOUNG placing his erect penis  
13 onto Plaintiff's hand; all which was done for sexual gratification of YOUNG...and all of which  
14 was done without prior notice, prior consent, and/or the prior approval and/or agreement of  
15 Plaintiff." Thus, the Duvall's allege that Young "intentionally made physical contact with [Audra  
16 Duvall] when [Young] engaged in lewd or lascivious acts sexual in nature, touched [Audra  
17 Duvall's] breasts and genitalia without permission or consent, exposed [Audra Duvall's] breast  
18 and genitalia without permission or consent, and placed YOUNG's penis on [Audra Duvall's]  
19 had without permission or consent."

20 Similarly, in The Ackermann Underlying Action, Stacey Ackermann alleges that Young  
21 sexually assaulted her by "proceed[ing] to initiate unwanted, harmful and offensive contact  
22 against Plaintiff." She alleges that Young "engaged in despicable and egregious conduct"  
23 including "harmful and offensive sexual contact upon her person."

24 Regardless of the truth or falsity of the allegations raised against Young, there can be no  
25 coverage as a result of Starr's exclusion provision. There is no coverage under the Starr Policy  
26 for the actual or threatened abuse or molestation by Young of Audra Duvall and Stacey  
27 Ackermann while they were in Young's care, custody or control. All of the predicated acts that  
28 form the basis of The Duvall Underlying Action and The Ackermann Underlying Action arise out

of Young's abuse or molestation as both women allege Young initiated unwanted sexual contact upon them during the course of the massage.

**C. Coverage is excluded under the Assault and Battery Exclusion.**

The assault and battery exclusion in the Starr policy excludes "bodily injury" arising from the following:

- (1) assault and battery or any act or omission in connection with the prevention or suppression of such acts; or
- (2) harmful or offensive contact between or among two or more persons; or
- (3) apprehension of harmful or offensive contact between or among two or more persons; or
- (4) threats by words or deeds.

Further, the assault and battery exclusion goes on to provide the following:

This exclusion also applies to any claims by any other person, firm or organization, asserting rights derived from or contingent upon any person asserting a claim excluded under subparagraphs 1, 2 or 3 (above); specifically excluding from coverage claims for:

- (1) emotional distress or for loss of society, services, consortium and/or income; or
- (2) reimbursement for expenses (including but not limited to medical expenses, hospital expenses and wages) paid or incurred by such other person, firm or organization; or
- (3) any obligation to share damages with or repay someone who must pay damages because of the injury.

Courts have routinely held that assault and battery exclusions like the one at issue here "preclude coverage of any claim based on assault and battery irrespective of the legal theory asserted against the insured." Century Transit Sys., Inc. v. American Empire Surplus Lines Ins. Co., 42 Cal. App. 4th 121, 49 Cal. Rptr. 2d 567, 571 (Ct. App. 1996).

The Duvall Underlying Action alleges Young sexually assaulted and battered Audra Duvall. Specifically, the Duvalls' allege that Young "intentionally caused [Audra Duvall] to feel apprehension of harmful or offensive contact when [Young] unlawfully engaged in lewd or lascivious acts sexual in nature, touched [Audra Duvall] breasts and genitalia without permission or consent, exposing [Audra Duvall's] breast and genitalia without permission or



1 consent, and placing YOUNG's penis on [Audra Duvall's] hand without permission or consent."  
2 Moreover, the Duvalls' go on to allege that Young "intentionally made physical contact with  
3 [Audra Duvall] when [Young] engaged in lewd or lascivious acts sexual in nature, touched  
4 [Audra Duvall's] breasts and genitalia without permission or consent, exposed [Audra Duvall's]  
5 breast and genitalia without permission or consent, and placed YOUNG's penis on [Audra  
6 Duvall's] had without permission or consent."

7 Similarly, in The Ackermann Underlying Action, Stacey Ackermann alleges that Young  
8 sexually assaulted her by "proceed[ing] to initiate unwanted, harmful and offensive contact  
9 against Plaintiff." She alleges that Young "engaged in despicable and egregious conduct"  
10 including "harmful and offensive sexual contact upon her person."

11 Here, the Assault and Battery Exclusion contained in the Starr Policy clearly acts to  
12 exclude coverage for the underlying actions. As indicated from the above policy language, the  
13 Starr policy excludes "bodily injury" arising from "(1) assault and battery..." and "(2) harmful or  
14 offensive contact between or among two or more persons." All of the predicated acts that form  
15 the basis of The Duvall Underlying Action and The Ackermann Underlying Action arise out of  
16 Young's sexual assault and battery and Young's harmful or offensive contact. Thus, considering  
17 the allegations in the underlying complaints, the assault and battery exclusion bars coverage for  
18 Young's actions under the policy.

19 Moreover, the Assault and Battery Exclusion "also applies to any claims by any other  
20 person, firm or organization, asserting rights derived from or contingent upon any person  
21 asserting a claim excluded under subparagraphs 1, 2 or 3." Specifically excluding from  
22 coverage claims for "loss of...consortium." In the Duvall Underlying Action, Michael John  
23 Duvall alleges a claim for loss of consortium as the result Young's sexual assault and battery  
24 and Young's harmful or offensive contact with Audra Duvall. Thus, this exclusion clearly bars  
25 coverage for Michael John Duvall's claim for loss of consortium alleged in the Duvall Underlying  
26 Action.

27 ///

28 ///



**D. Coverage is barred because any alleged injury was not the result of an "occurrence."**

The Starr policy only applies to the extent that there is a claim against Young for "bodily injury" caused by an "occurrence." The STARR Policy defines an "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions."

"Occurrence" based policies are common and have been interpreted by the Nevada Supreme Court to mean that, where the act of the insured is deliberate, the injuries cannot be the result of an "occurrence". See Beckwith v. State Farm Fire and Casualty Company, 120 Nev. 23 (2004). Whether the insured intended to inflict injury is irrelevant for determining whether the actual injury producing force was an accident. Id.

In California, an "occurrence" in the context of a lawsuit for sexual assault of a woman, was discussed for insurance coverage purposes, and found not covered under a liability insurance policy applicable only to "accidents," even if the insured claims not to have intended to injure the person because sex was consensual. Merced Mutual Ins. Co. v. Mendez, 213 Cal. App. 3d 41, 50 (Cal. App. 5<sup>th</sup> Dist. 1989). In Merced Mutual, the court states:

An accident ... is never present when the insured performs a deliberate act unless some additional, unexpected, independent, and unforeseen happening occurs that produces the damage. ... Clearly, when the insured acted deliberately with the intent to cause injury, the conduct would not be deemed an accident. Moreover, where the insured intended all of the acts that resulted in the victim's injury, the event may not be deemed an "accident" merely because the insured did not intend to cause the injury. ... Id.

Both underlying complaints, including the underlying facts and the theories of recovery all confirm that Young's acts were deliberate and that is the basis of imposing liability. Thus, any alleged injury was not the result "occurrence" defined under the policy. Because the policy only provides coverage for an "occurrence," the policy does not provide coverage in the underlying actions.

**E. Coverage under the policy is barred by the intentional act exclusion.**

Even if the underlying plaintiffs' injuries were accidental, and "therefore an 'occurrence' under the policy, they are uninsurable under an exclusionary provision." Capitol Indem. Corp. v.

1 Blazer, 51 F.Supp.2d 1080,1086 (citing Hermitage Ins. Co. v. Dahms, 842 F.Supp. 319, 324,  
 2 326 (N.D. Ill. 1994)). Like most general liability policies, the Starr Policy excludes coverage for  
 3 bodily injuries that are "expected or intended" from the standpoint of Young. To prevail on this  
 4 claim, Starr need not prove Young's actual subjective intent. Rather, Nevada case law provides  
 5 that such intent can be presumed or inferred from the nature of certain intentional acts. See  
 6 e.g., Rivera v. Nevada Med. Liab. Ins. Co., 107 Nev. 450 (1991) (holding that an intentional act  
 7 exclusion precluded claim of patient alleging sexual assault by physician regardless of  
 8 physician's subjective intent because forcible rape was an act which physician knew with  
 9 substantial certainty would cause harm to victim); Beckwith v. State Farm Fire & Cas. Co., 120  
 10 Nev. 23 (2004) (finding that intentional striking of someone in the face is an intentional act  
 11 subject to a properly drafted "intentional acts" exclusion clause). In other words, under Nevada  
 12 law the intent to cause the ultimate harm may be inferred where the actor "knows with  
 13 substantial certainty [that the act] will cause harm to a victim." Rivera, 107 Nev. at 454.

14 When harm is inherent in the act itself as in this case, the injury must be expected and  
 15 exclusion applies. All of the predicated acts that form the basis of The Duvall Underlying Action  
 16 and The Ackermann Underlying Action arise out of Young's unwanted sexual contact upon  
 17 them during the course of the massage. Based upon these sexual assaults Young's intent can  
 18 be presumed or inferred from the nature of Young's intentional acts. Thus, coverage is barred  
 19 under the intentional acts exclusion in Starr's policy.

20 **F. Emotional injuries are not "bodily injuries" as defined by the Starr Policy.**

21 The Starr policy only applies to the extent that there is a claim against Young for "bodily  
 22 injury" caused by an "occurrence." "Bodily injury" is defined in the policy as "bodily injury,  
 23 sickness or disease sustained by a person, including death resulting from any of these at any  
 24 time."

25 The Ninth Circuit Court of Appeals, applying Nevada law, addressed, but did not answer,  
 26 whether a claim under a homeowner's policy for emotional distress sustained by a minor, on  
 27 account of sexual abuse committed by her stepfather, qualified as "bodily injury." State Farm  
 28 Fire and Casualty Co. v. Pickard, 849 F.2d 1220 (9th Cir. 1988). In Pickard, the Ninth Circuit

1 stated that if "bodily injury" did not include emotional distress, there was no coverage and,  
 2 alternatively, if "bodily injury" included emotional distress, the exclusion clause denied  
 3 coverage. Id.

4 Thus, while Nevada case law has not addressed this issue the majority of the courts in  
 5 other jurisdictions have overwhelmingly found that emotional injuries do not qualify as "bodily  
 6 injury." See Evans v. Farmers Ins. Exch., 34 P.3d 284, 286 (Wyo. 2011)(noting that the  
 7 "overwhelming majority" of jurisdictions hold that bodily injury encompasses only physical  
 8 harm); Citizens Ins. Co. of America v. Leiendecker, 962 S.W.2d 446, 452 (Mo. App. E.D. 1998)  
 9 (collecting cases); see also Keri Farrell-Kolb, Note, General Liability Coverage for Claims of  
 10 Emotional Distress--An Insurance Nightmare, 45 Drake L.Rev. 981, 986-989 (1997).

11 Both underlying complaints, including the underlying facts and the theories of recovery  
 12 allege that the claimants did not sustain "bodily injury" as defined under the policy. To the  
 13 extent that the underlying Plaintiff's only sustained emotional injuries, the Starr policy does not  
 14 provide coverage for such injuries. Further, this exclusion would clearly bar Michael John  
 15 Duvall's claim for loss of consortium alleged in the Duvall Underlying Action.

## 16 V.

## 17 CONCLUSION

18 Based on the foregoing, Plaintiff, Starr Indemnity & Liability Company, respectfully  
 19 request this Court enter judgment in favor of Starr Indemnity & Liability Company against  
 20 Defendant Limmie Young, III, providing the following declarations:

21 1. No coverage or potential for coverage exists under the terms and provisions of the  
 22 STARR Policy for the claims by AUDRA L. DUVALL and MICHAEL JOHN DUVALL against  
 23 LIMMIE YOUNG, III in *Audra L Duvall, et al., v. Aposseadessee III, LLC, Limmie Young, III, et*  
 24 *al.*, Clark County District Court Case number A-13-681072-C.

25 2. STARR has no duty to defend or indemnify claims by AUDRA L. DUVALL and  
 26 MICHAEL JOHN DUVALL against LIMMIE YOUNG, III in *Audra L Duvall, et al., v.*  
 27 *Aposseadessee III, LLC, Limmie Young, III, et al.*, Clark County District Court Case number A-  
 28 13-681072-C.

3. No coverage or potential for coverage exists under the terms and provisions of the STARR Policy for the claims by STACEY ACKERMANN against LIMMIE YOUNG, III in *Stacy Ackermann., v. Aposseadessee III, LLC, Limmie Young, III, et al.*, Clark County District Court Case number A-13-678512-C.

4. STARR has no duty to defend or indemnify claims by STACEY ACKERMANN against LIMMIE YOUNG, III in *Stacy Ackermann., v. Aposseadessee III, LLC, Limmie Young, III, et al.*, Clark County District Court Case number A-13-678512-C.

DATED: May 1, 2014

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**PROOF OF SERVICE**

**STATE OF NEVADA, COUNTY OF CLARK**

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Clark, State of Nevada. My business address is 6900 Westcliff Drive, Suite 605, Las Vegas, Nevada 89145.

On May 1, 2014, I served true copies of the following document(s) described as **STARR INDEMNITY & LIABILITY COMPANY'S MOTION FOR SUMMARY JUDGMENT** on the interested parties in this action as follows:

**SEE ATTACHED LIST**

**BY CM / ECF FILING SYSTEM AND U.S. MAIL:** I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Murchison & Cumming's practice for collecting and processing correspondence for mailing. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one business day after the date of deposit for mailing in this declaration.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

Executed on May 1, 2014, at Las Vegas, Nevada.

/s/ Nicole Garcia  
Nicole Garcia

**SERVICE LIST**

**STARR INDEMNITY & LIABILITY COMPANY v. Young, Limmie, et al.**

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